UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA PRO-LIFE COUNCIL, INC.,

Plaintiff,

v.

KAREN GETMAN, et al.,

Defendants.

NO. CIV. S-00-1698 FCD/GGH

MEMORANDUM AND ORDER

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Pending before the court are cross-motions for summary judgment brought by plaintiff, California Pro-Life Council ("CPLC"), and defendants, Bill Lockyer, Attorney General of the State of California; Karen Getman, Chairman of the California Fair Political Practices Commission ("FPPC"); and William Deaver, Kathleen Makel, Carol Scott, and Gordona Swanson, members of the FPPC (collectively "defendants").[1] CPLC asserts that certain

[1] The original complaint named Jan Scully, District Attorney of Sacramento in her official capacity and as a representative of a class of district attorneys in the State of California, and Samuel L. Jackson in his official capacity as (continued...)

reporting and disclosure provisions in California's Political Reform Act ("PRA"), Cal. Gov't Code §§ 81000, et seq., violate the First and Fourteenth Amendment rights of CPLC and similar groups who, among other activities, expressly advocate for and against the passage of ballot measure initiatives.[2] Defendants assert that California has a compelling interest in requiring such disclosures, and that the challenged PRA provisions are narrowly tailored to advance the state's compelling interest. For the reasons set forth below, CPLC's motion is denied and defendants' motion is granted.

FACTUAL BACKGROUND

CPLC is a non-profit 501(c)(4) corporation "dedicated to fostering respect for life." (Amended Verified Complaint ("AVC") ¶ 11; Defs.' Reply Stmnt. of Undisp. Facts ("UF") ¶ 3.) CPLC is affiliated with the National Right to Life Committee, Inc. ("NRLC") (UF ¶ 1.)

To further its organizational purposes, CPLC raises and expends funds for various types of communications to its members and the general public. Among these communications are mailings and periodic newsletters, which range in size from 15,000 pieces to over 100,000 pieces for "voter guide" editions. (UF ¶ 3.) The money for these communications comes from CPLC's general treasury, which accepts funds from a variety of sources,

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[1](...continued)
City Attorney of Sacramento and as a representative of a class of city attorneys in the State of California. These defendants since were dismissed.

[2] The First Amendment is made applicable to the states by the Fourteenth Amendment.

including corporate donations. (UF ¶¶ 6,7.)

In addition to the above-described activities, CPLC historically has maintained between three and four "internal" Political Action Committees ("PACs"), which make direct political expenditures. (UF ¶ 9.) CPLC's PACs include "CPLC PAC", "Federal PAC", the Citizens for Judicial Integrity PAC ("Citizens PAC"), and an independent expenditure PAC ("IE PAC").[3] (UF ¶ 9.) In recent elections, CPLC's PACs have made sizeable expenditures to advocate for the passage or defeat of ballot measures, including Proposition 161 (1992 - physician assisted suicide), Proposition 226 (1998 - restrictions on union collection of PAC contributions), Proposition 25 (1998 - public financing of candidate and ballot measure campaigns), Proposition 3 (1998 - amendment to open primary law passed in 1996), and Proposition 52 (2002 - election day voter registration). In total, CPLC's PACs expended $126,921.00 in 1998, $44,862.00 in 2000, and $111,450.00 in 2002, on candidate and ballot measure advocacy. (UF ¶¶ 10,

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[3] CPLC admits that it maintains three PACs: CPLC PAC, Federal PAC, and IE PAC. CPLC disputes that Citizens PAC is a CPLC PAC, though it acknowledges CPLC "may have done bookkeeping for [Citizens PAC]." (UF ¶ 9.) However, CPLC offers insufficient evidence to create a triable issue on this point. The ambiguous statement by Michael Spence that "I don't think the CPLC was involved with the Citizens for Judicial Integrity" is directly contradicted by CPLC's interrogatory responses, in which it identified Citizens for Judicial Integrity PAC as a PAC "organized or operated by plaintiff or its agents." (UF ¶ 9.) Moreover, CPLC reported "Judicial Integrity PAC" expenditures on its 1998, 1999 and 2000 federal tax returns. (UF ¶ 9; CPLC's Resp. to Def. Downey's Third Set of Interrogs., Ex. 16 to Leidigh Reply Aff.) See Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000) ("A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact.").

14, 16.)

Generally, CPLC's PACs receive funds directly from contributors. However, on occasion, CPLC has transferred funds from its general treasury to one or more of its PACs. For example, in 1998, CPLC transferred $35,000 from its general treasury to CPLC PAC, which in turn expended $45,000 in support of Dan Lungren for Governor and tens of thousands of dollars in support of and opposition to other candidates. (UF ¶ 17.)

Because CPLC's PACs receive contributions and make expenditures for political purposes, they must comply with the PRA's reporting requirements. If CPLC, itself, were to receive contributions or makes expenditures for political purposes above certain monetary thresholds, it too would fall within the ambit of the PRA. CPLC challenges the application of the PRA to groups like it, which engage in many activities, only one of which is political advocacy. Such groups are referred to generally as multi-purpose organizations and are distinguishable from "primary purpose committees" which are formed primarily for the purpose of influencing the action of voters for or against the nomination or election of a candidate or qualification or passage of a ballot measure. (McKnew Advice Letter No. A-76-025, Ex. A to Aff. of Carla Wardlow in Supp. of Defs.' Mot. for Summ. J. ("Wardlow Aff.")

Under the PRA, if CPLC or a similar multi-purpose organization receives "contributions" of $1,000.00 or more in a calendar year for political purposes, it qualifies as a "committee" under Cal. Gov't Code § 82013(a). (Wardlow Aff. ¶

7.)[4] "Contribution" is defined to include payments that are not specifically earmarked for political purposes, such as donations and membership dues, if the donor or member "knew or had reason to know" that some or all of the funds would be used to make contributions or expenditures. Cal. Code. Regs. tit. 2 § 18215(b)(1).

PRA regulations provide what is known as the "one bite of the apple rule," a presumption that donors or members do not know that their payments will be used for political purposes when the organization has no recent history of expenditures for political activity. (Wardlow Aff. ¶ 10.) The "one bite of the apple rule" is designed to assist organizations like CPLC in determining whether their members "had reason to know" that some or all of their funds would be used for political purposes. (Id.) However, once an organization has established a "history of making contributions from its general fund, its members are deemed to be on notice in subsequent years that a portion of their payments may be used for political purposes. Thus, in any subsequent calendar year in which the [organization] makes contributions out of its general fund totaling $ 1,000.00 or more, it will qualify as a recipient committee." (Olson Advice Letter dated Sept. 12, 1990, at 3, Ex. B-1 to Def. Lockyer's Expert Witnesses' Affs. with Exs.)

Once an organization reaches the $1,000.00 contribution threshold, it becomes a "recipient committee," and certain

[4] Plaintiff submitted no admissible evidence in support of its motion for summary judgment or in opposition to defendants' motion for summary judgment. Consequently, defendants' submitted evidence remains largely undisputed.

organizational requirements are triggered.[5] Specifically, the organization must file a registration statement, designate a treasurer, establish a campaign record-keeping system, and satisfy certain requirements before terminating the committee. (Wardlow Aff. ¶ 12.) In addition, as a registered committee, the organization must file periodic campaign reports disclosing contributions received and expenditures made. However, only that portion of the organization's funds used for political purposes must be disclosed. For example, if an organization expends $10,000.00 of its $100,000.00 in total funds (or 10%) on political advocacy, it is required to disclose only the $10,000.00 expended for political purposes.

Similarly, the organization's disclosure of contributions is limited. Only contributions of $100.00 or more are reportable, and those are first "prorated" based on the percentage of the organization's receipts expended for political purposes. Cal. Gov't Code § 84211(f); Aff. of Richard Eichman, Ex. to Def. Lockyer's Expert Witnesses Affs. with Exs. ("Eichman Aff.") ¶ 9. Using the same hypothetical numbers as above, if the organization expended 10% of its total receipts for political purposes, the organization could designate 10% of each individual payment for

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[5] "Recipient committee" is defined as, "any person or combination of persons who directly or indirectly . . . (a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year [or] (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year." Cal. Gov't Code § 82013(a),(b).

political purposes.[6] Under this formula, only $10.00 of a $100.00 payment would be designated as a "contribution." As the organization is only required to report "contributions" of $100.00 or more, only payments of $1,000.00, once prorated, would be reportable. (See Eichman Aff. ¶ 13.)

An organization can avoid recipient committee status and its attendant disclosure obligations by formally establishing a PAC, a form of recipient committee used for the purpose of making contributions and expenditures in connection with California elections. (Wardlow Aff. ¶ 13.) The organization can solicit political contributions separately from other donations which are received directly by the PAC. (Id.) As recipient committees, PACs must comply with PRA disclosure and other requirements. (Id.) However, forming a PAC can simplify an organization's reporting obligations. (Id.) CPLC, which maintains between three and four PACs, appears to use this method to satisfy its PRA disclosure obligations.

PROCEDURAL HISTORY

A. The Complaint

On August 8, 2000, CPLC filed its initial complaint with this court, which was supplanted by an amended verified complaint filed September 27, 2000. The essence of CPLC's ten-count Amended Verified Complaint ("complaint" or "AVC") is that Cal. Gov't Code §§ 82031 and 82013(a) and (b) Cal. Code Regs. tit. 2, §§ 18225(b) and 18215(b), violate CPLC's First and Fourteenth

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[6] The organization can use any reasonable method to determine the amount of each donor or member's payment used to make political expenditures. 2 Cal. Code Reg. § 18215(b)(1). (See also Wardlow Aff. ¶ 12.)

Amendment rights by subjecting them to onerous reporting requirements for engaging in express advocacy of ballot measures.

Specifically, the complaint alleges as follows:

In Counts 1 and 3 of the complaint, CPLC alleges that Cal. Gov't Code § 82031 and Cal. Code Regs. tit. 2, § 18225(b) are facially unconstitutional because the definition of "independent expenditure" extends beyond express advocacy of candidates and includes "communications that simply discuss candidates," thereby subjecting organizations such as CPLC to "onerous reporting requirements," for engaging in mere "issue advocacy" in violation of its First Amendment rights. (AVC ¶¶ 66-69, 95-98)

In Counts 2 and 4, CPLC alleges that Cal. Gov't Code § 82031 and Cal. Code Regs. tit. 2, § 18225(b) are facially unconstitutional because the definition of "independent expenditure" includes ballot measure advocacy. CPLC alleges that ballot measure advocacy of any kind, including express ballot measure advocacy, constitutes "pure issue advocacy" and cannot be regulated. CPLC alternatively maintains that, even if certain ballot measure initiative advocacy can be regulated, Cal. Gov't Code § 82031 and Cal. Code Regs. tit. 2, § 18225(b) are unconstitutional because they extends beyond express ballot measure advocacy and include the mere discussion of ballot measure initiatives. (Id. ¶¶ 80-86, 109-115.)

In Counts 5 and 10, CPLC alleges that Cal. Gov't Code § 82031 and Cal. Code Regs. tit. 2, § 18225(b), and Cal. Gov't Code §§ 82013(a) and (b) and Cal. Code Regs. tit. 2, § 18215(b), respectively, are void for vagueness because ordinary people cannot understand what constitutes an "independent expenditure."

(Id. ¶¶ 117-18, 163-64.)

In Count 6, CPLC alleges that Cal. Gov't Code §§ 82013(a) and (b) are unconstitutional on their face and as applied to CPLC because their respective definitions of "independent expenditure committee" and "recipient committee" require individuals and organizations which engage in pure issue advocacy to suffer "burdensome record keeping, reporting and notice requirements." (Id. ¶¶ 128-129.)

In Counts 7, 8, and 9, CPLC alleges that Cal. Gov't Code §§ 82013(a) and (b) and Cal. Code Regs. tit. 2 § 18215(b) unconstitutionally treat organizations as "committees" without regard to whether the organization's "major purpose" is political advocacy. (Id. ¶¶ 130-160.) According to the complaint, such treatment is inconsistent with Buckley v. Valeo, 424 U.S. 1 (1976).

B. Disposition of Plaintiffs' Claims

By order filed October 24, 2000, this court dismissed Counts 1 and 3 for lack of standing to challenge the PRA's regulation of candidate advocacy. The court dismissed Counts 2, 4, and 6 for failure to state a claim pursuant to Rule 12(b)(6).

The court dismissed Counts 5 and 10 (vagueness challenges) only to the extent they were directed to regulation of communications involving candidates and mere discussion of ballot measure initiatives. Counts 5 and 10 survived the motion to dismiss to the extent they were directed at express ballot measure advocacy. However, by subsequent order dated January 22, 2002, the court granted defendants' motion for summary judgment as to the remainder of Counts 5 and 10, holding that plaintiffs

had not demonstrated a credible threat of prosecution and thus the matter was not ripe for review.

Counts 7, 8, and 9 were dismissed by stipulation of the parties.

C. Ninth Circuit Decision and Remand Instructions

CPLC appealed both the Court's October 24, 2000 Order granting defendants' motion to dismiss Counts 1, 2, 3, 4, and 6 and parts of Counts 5 and 10, and the January 22, 2002 order granting summary judgment in favor of defendants on Counts 5 and 10.

The Ninth Circuit affirmed this court's dismissal of Counts 1 and 3, holding that CPLC "does not have standing to argue that the definition of 'independent expenditure' is unconstitutionally vague as applied to its candidate advocacy" because CPLC "faces no credible threat of prosecution for its candidate advocacy." Id. at 1096.

However, the court reversed this court's grant of summary judgement of Counts 5 and 10 on ripeness grounds. The court held that CPLC could challenge the allegedly vague definition of "independent expenditure" as it related to CPLC's express ballot measure advocacy because CPLC suffered a "constitutionally sufficient injury of self-censorship rendering its vagueness challenge . . . justiciable." Id. at 1093.

Rather than remand CPLC's vagueness challenge to the "independent expenditure" definition, the Ninth Circuit addressed the merits, noting that the issue had been fully briefed by the parties and strenuously advocated at oral argument. Id. at 1096 n. 5. CPLC contended that the definition of "independent

expenditure" violated the bright-line rule from Buckley v. Valeo, 424 U.S. 1, 43-44 (1976), under which only communications containing explicit words of advocacy may be regulated.[7] The court concluded that the definition, as narrowly defined by the California appellate court in Governor Gray Davis Committee v. American Taxpayer Alliance, 102 Cal. App. 4th 449 (2002), was not unconstitutionally vague.

Lastly, the Ninth Circuit addressed Counts 2, 4, and 6, "CPLC's more general challenge to the PRA's regulation of ballot measure advocacy." Id. at 1100. CPLC argued that under Buckley, supra, a state may not regulate express ballot measure advocacy. The court noted that the issue was one of first impression among the federal courts of appeal. Starting its analysis with the appropriate level of scrutiny, the court concluded that the PRA's disclosure provisions burden protected First Amendment speech and therefore must satisfy strict scrutiny. Noting that the Supreme Court had "repeated[ly] acknowledge[d] the constitutionality of state laws requiring disclosure of funds spent to pass or defeat ballot measures," the court affirmed "the district court's conclusion that express ballot measure advocacy is not immune from regulation." Id. However, the court explained that there are limits: while "the First Amendment tolerates some regulation of express ballot measure advocacy, it does not necessarily follow that the PRA regulations are constitutional." Id. The

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[7] Specifically, CPLC objected to the following language defining independent expenditure as, inter alia, "an expenditure made . . . which . . . taken as a whole and in context, unambiguously urges a particular result in an election . . .." Cal. Gov't Code § 82031.

court remanded, stating that it was for this court to determine in the first instance whether the PRA's disclosure regime satisfied strict scrutiny.

Before remanding, however, the court addressed CPLC's argument that, as a matter of law, California had no compelling interest in regulating express ballot measure advocacy. Referring to "California's high stakes form of direct democracy," in which millions of dollars are spent to pass or defeat ballot measures during a given election year, the court concluded that "being able to evaluate who is doing the talking is of great importance." Id. The court then remanded and instructed this court to decide, based on a fully developed record if necessary, whether the state's interest was in fact compelling, and whether the challenged PRA provisions were narrowly tailored to advance that interest. Id. at 1107.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). If the moving party does not bear the burden of proof at trial, he or she may discharge his burden of showing that no genuine issue of material fact remains by demonstrating

that "there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party meets the requirements of Rule 56 by showing there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

Genuine factual issues must exist that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." Id. at 250. In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985); Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

ANALYSIS

I. Level of Scrutiny

The Ninth Circuit held that this court should apply strict scrutiny because the PRA's disclosure regime, which requires the preparation and submission to the state of "detailed reports" regarding the source and amount of political expenditures and

contributions, "unquestionably infringes upon the exercise of First Amendment rights." California Pro Life Council, Inc. v. Getman, 328 F.3d 1088, 1101 (9th Cir. 2003). Thus, this court must determine if California has a compelling state interest in its disclosure regime and whether that regime is narrowly drawn.

II. Compelling Interest

Defendants assert an interest in informing the electorate regarding the source of funds used to support and oppose ballot measures, as well as an interest in maintaining the integrity of its electoral and legislative processes. CPLC does not raise any argument or submit any evidence to dispute defendants' asserted interests.[8] However, as defendants bear the burden to establish a compelling state interest, the court will evaluate defendants' undisputed evidence and determine if a compelling interest has been shown.

The stated purposes of the PRA include:

(a) Receipts and expenditures in election campaigns

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[8] CPLC asserts that California's only interest is informational because the Ninth Circuit defined it as such in its opinion. The Ninth Circuit specifically held that the three potential governmental interests are (1) informing the electorate about the sources and uses of funds expended, (2) deterring corruption, and the appearance of corruption, and (3) gathering data to detect violations. Getman, 328 F.3d at 1105 n. 23 (citing Buckley, 424 U.S. at 66-68. The court found that "only the informational interest applies in the ballot measure context," because the risk of corruption is not present with a vote on a public issue, and "the interest in collecting data to detect violations also does not apply, since there is no cap on ballot-measure contributions or expenditures in California." Id. Defendants assert an informational interest in informing voters as well as an interest in protecting the integrity of election and legislative processes which is achieved by informing the electorate regarding the identity of veiled political actors. This interest can be defined as informational and therefore consistent with the Ninth Circuit's description of the interests at stake.

> should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices inhibited. . ..

Cal. Gov't Code § 81002.

As noted by the Ninth Circuit in Getman and by this court in its October 24, 2000 Order, the Supreme Court repeatedly has recognized the importance of expenditure and contribution disclosure in the ballot measure context. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)(noting that voters may consider the source and credibility of a message's proponent and requiring disclosure of the source of communications has a prophylactic effect); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981)(concluding that the integrity of the political system is adequately protected if contributions are identified in public filings revealing the amounts contributed); Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999)(upholding regulation requiring initiative sponsors to disclose funding for petition circulators and noting with approval that such requirement informed voters of the source and amount of money spent qualifying measure for the ballot).

The need for information regarding the source and amount of political expenditures is paramount in California, where, each election cycle, voters confront myriad ballot measure initiatives and referenda at the state and local levels.[9] In the last election, for example, California led the nation with sixteen measures on the statewide ballot.

Californians have used ballot measure initiatives to enact

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[9] See Information on the Initiative and Referendum Process at the Local Level, http://lawweb.usc.edu/iri/local-ir.htm.

laws on complex policy issues and with profound ramifications. (See UF 55.) One of the most dramatic examples is voter passage of Proposition 13 in 1978, which overhauled the state's property tax rules and led to a restructuring of state and local government finance.[10] More recently, Californians have denied recognition of out-of-state same-sex marriages (Proposition 22, 1998), prohibited use of affirmative action in state hiring and education (Proposition 209, 1996), increased criminal sentences for "third strike" offenders (Proposition 184, 1994), approved expansion of casino gambling on Indian reservations (Proposition 5, 1998), and denied recovery of non-economic damages for uninsured accident victims (Proposition 217, 1998).

Proponents and opponents of California ballot measure initiatives spend hundreds of millions of dollars each election year to influence voters. In 1998 alone, $200 million was spent for and against twelve propositions on the statewide ballot. (Leidigh Dec., filed September 12, 2000.) The Ninth Circuit aptly described the "cacophony of political communications" produced by such large sums of money, from which voters "must pick out meaningful and accurate messages." Getman, 328 F.3d at 1105. The volume is particularly high in the ballot measure context, where contributions and expenditures are unlimited. (UF ¶ 78.)

Voters rely on information regarding the identity of the speaker to sort through this "cacophony", particularly where the

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[10] See Michael A. Shires, *Research Brief: Changes in State and Local Public Finance Since Proposition 13*, Public Policy Institute of California, March 1999. http://www.ppic.org/content/pubs/RB 399MSRB.pdf

effect of the ballot measure is not readily apparent. (UF ¶¶ 52-54, 62, 64.) While the ballot pamphlet sent to voters by the state contains the text and a summary of ballot measure initiatives, many voters do not have the time or ability to study the full text and make an informed decision. (UF ¶ 55.) Since voters might not understand in detail the policy content of a particular measure, they often base their decisions to vote for or against it on cognitive cues such as the names of individuals supporting or opposing a measure, as listed in the ballot pamphlet, or the identity of those who make contributions or expenditures for or against the measure, which is often disclosed by the media or in campaign advertising. (UF ¶ 56.) Such cues play a larger role in the ballot measure context, where traditional cues, such as party affiliation and voting record, are absent. (UF ¶ 56.)

However, because groups supporting and opposing ballot measures frequently give themselves ambiguous or misleading names, reliance on the group, without disclosure of its source of funds, can be a trap for unwary voters. For example, a tobacco manufacturing group that opposes regulations on smoking might call itself "Citizens for Consumer Protection". This name might mislead voters into thinking that Citizens for Consumer Protection is a consumer advocacy group when, in fact, it protects the commercial interest of the tobacco industry. If the organization's donor information is disclosed and opposing groups and the press publicize the information, voters have a better chance of discerning the organization's true interest. (UF ¶ 71.)

Interest groups also seek to conceal their political involvement by availing themselves of complicated arrangements consisting of nonprofit corporations, unregulated entities and unincorporated entities. (UF ¶ 77.) Without disclosure requirements, citizens are likely to be uninformed and unaware that tens of millions of dollars are spent on ballot measure campaigns by such veiled political actors. (Id.)

According to several of defendants' experts, disclosure of this information is of critical importance, in light of the nature and complexity of the direct democracy process in California. (UF ¶ 74, 75.) Voters tend to agree. When asked, voters have indicated that information regarding the source and amount of campaign contributions to ballot measures plays an important role in their decision-making. (UF ¶ 67.) Voters rate such information as more valuable than newspaper endorsements, campaign mailings, TV and radio advertisements, and endorsements by interest groups, politicians or celebrities. (Id.)

In light of the number and complexity of ballot measures confronted by California voters, the staggering sums expended to influence their passage or defeat, the very real potential for deception through the formation of advocacy groups with appealing but misleading names, and voters' heavy reliance on funding source information when deciding to support or oppose ballot measures, the court finds that California has a compelling informational interest in providing the electorate with information regarding contributions and expenditures made to pass or defeat ballot measure initiatives.

While the court believes California's interest in fully

informing voters is sufficient, California also has an compelling interest in maintaining the integrity of its electoral and legislative processes by revealing the identity of veiled political actors and preventing such actors from concealing their identities by funneling money through organizations such as CPLC. Defendants have cited several examples from past elections of such deceptive practices. (See e.g., Aff. of Steve Hopcraft ¶¶ 8-13; Aff. of Lenny Goldberg ¶¶ 8-25.) One such example, involves CPLC directly. In February 2002, CPLC established the California Pro-Life Council Inc. Independent Expenditure Committee ("IE PAC"). Twelve days later, IE PAC received its only contribution to date, $10,000.00 from the Bay Area Free Enterprise PAC (UF ¶ 40.) Less than a week earlier, the Bay Area Free Enterprise PAC had received its only contributions, $25,000.00 from PG & E and $1,000.00 from the Smokeless Tobacco Council, Inc. Without the PRA's disclosure requirements, the true source of IE PAC's funds could not be exposed.

Accordingly, the court finds that defendants have a compelling state interest in informing the electorate regarding contributions and expenditures made to pass or defeat ballot measure initiatives and in maintaining the integrity of its electoral and legislative processes preventing veiled political actors from concealing their involvement in the political process.

III. Least Restrictive Means

The court next must determine whether the challenged PRA provisions are "closely tailored to advance the [state's compelling] interest." Getman, 328 F.3d at 1101.

Initially, however, the court addresses CPLC's contention that this case is governed by the "major purpose test" as framed by Buckley, supra, and reaffirmed by Federal Election Commission v. Massachusetts Citizens fo Life, Inc.("MCFL"), 479 U.S. 238 (1986).[11] According to CPLC the "major purpose test" prohibits the government from imposing PAC-like registration and reporting requirements on organizations who do not have campaign activity as their major purpose. (AVC ¶ 135.) CPLC argues that, because the Ninth Circuit referred to MCFL in its decision, it was telegraphing to this court that this "is a major purpose case."

The Court disagrees that the Ninth Circuit, by citing MCFL, intended that this court bypass a careful, fact-intensive strict scrutiny analysis and instead apply a "per se rule" that CPLC suggests can be found lurking within the text of Buckley and MCFL.[12] Moreover, even if Buckley and MCFL did create the bright-line test advocated by CPLC, rather than simply reaching conclusions after engaging in a strict scrutiny analysis in the factual context of those cases, such test is inapplicable here.

Both Buckley and MCFL addressed overbroad provisions of the Federal Election Campaign Act of 1971 ("FECA"), which regulated multi-purpose organizations when doing so did not advance the FECA's stated purposes.

In Buckley, the Court addressed the constitutionality of §

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[11] This court previously addressed this issue and found that the so-called major purpose test did not apply in this case. See October 24, 2000 Mem. and Order Denying Preliminary Injunction.

[12] Neither Buckley nor MCFL directly reference a "major purpose test."

434(e) of the FECA, which imposed disclosure requirements on "[e]very person (other than a political committee or candidate)" making contributions or expenditures exceeding $100.00. Buckley, 424 U.S. at 79. The Court first narrowly defined "political committee" to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" Id. The Court concluded that "expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress." Id.

The Court then drew contrast to expenditures by individuals and groups other than political committees: "when the maker of the expenditure . . . is an individual other than a candidate or a group other than a 'political committee' the relation of the information sought to the purposes of the Act may be too remote." Id. at 79-80. The Court salvaged § 434(e) by narrowly defining "expenditures" to capture only those funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. Id. at 80. The Court explained that its interpretation avoided overbreadth problems because "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." Id.

Similarly, the FECA provision challenged in MCFL was invalidated because it applied corporate PAC regulations to non-profit corporations, when the rationale for the regulations did not apply to non-profit corporations. Massachusetts Citizens for Life, Inc. ("MCFL") was a non-profit corporation subject to an

enforcement action by the Federal Elections Commission for printing and distributing a "Special Edition" of its newsletter prior to the 1978 Massachusetts primary election. Under § 441b of the FECA, corporations – including non-profit corporations – generally were prohibited from making direct expenditures in connection with any election to any political office. In order to make political expenditures, MCFL was required to establish a "separate segregated fund" which was subject to greater disclosure requirements than non-corporate entities. 2 U.S.C. §§ 441b(a), (b)(2)(c). In addition, MCFL could receive contributions only from "members," defined under the FECA to exclude persons who have merely contributed to or indicated support for an organization. 2 U.S.C. §§ 441b(a), (b)(4)(A).

On appeal, the Supreme Court held that the government did not have a compelling interest in imposing corporate PAC regulations on MCFL. The Court noted that Congress' purpose in placing restrictions on corporate political contributions and expenditures was to avoid the "corrosive influence of concentrated corporate wealth," which is not an indication of support for the corporation's political ideas, but rather constitutes "economically motivated decisions of investors and customers." Id. at 257-258. The Court found this concern completely inapplicable to MCFL, whose resources "in fact reflect popular support for the political positions of the committee." Id.

The PRA does not suffer the same defect of overbreadth confronted by the Court in Buckley and MCFL because the PRA does

not apply a one-size-fits-all disclosure regime to committees, regardless of their level of political involvement. To the contrary, disclosure obligations under the PRA are adjusted based on an organization's political activity. Unlike "primary purpose" committees, which disclose all receipts and expenditures, multi-purpose committees must disclose only contributions and expenditures actually spent in connection with political activities. By this method, the PRA elicits contribution and expenditure information necessary to inform voters about the political activities engaged in by multi-purpose organizations without overburdening such organizations with unnecessary disclosure of non-political financial information.[13]

Accordingly, the court concludes that the so-called "major purpose test" is inapplicable to this case.[14] However, this is

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[13] There are other important distinctions between the FECA and the PRA. Under the PRA, corporations and labor organizations *are* permitted to make direct independent expenditures for political advocacy. By contrast, under the FECA, most businesses having a corporate form as well as labor unions can make independent expenditures only from a committee formed solely for political purposes. See 2 U.S.C. § 441b. As discussed in MCFL, these separate "political committees" are subject to onerous reporting requirements, including the requirement to disclose all contributions and expenditures, even if unrelated to express ballot measure advocacy. There is no such counterpart under the PRA. Rather, corporations like CPLC are free to make expenditures and contributions directly from their general treasury. Moreover, the FECA's regulatory scheme cut off nearly all of MCFL's funding for political advocacy because its donors did not qualify as "members" under the FECA. No parallel provisions are present in the PRA which would limit the source of funds available to CPLC.

[14] A second question, which the court need not reach in light of its conclusion that the major purpose test is inapplicable, is whether CPLC's major purpose is campaign activity. CPLC suggests that it's major purpose is not campaign activity because less than 50% of its funds are expended on such

(continued...)

not to say that CPLC's level of involvement in political advocacy is irrelevant. To the contrary, the court will consider whether the PRA imposes any "unnecessary administrative or organizational requirements" on MCFL in evaluating whether the PRA disclosure regime is narrowly drawn. Getman, 328 F.3d at 1107.

The court now addresses whether the challenged provisions of the PRA are narrowly drawn to advance California's compelling interest. For purposes of this analysis, the court adopts the organizational framework outlined by the Second Circuit in Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2002), as amended, October 26, 2004. Under that approach, defendants must establish that (1) the disclosure rules at issue advance the state's compelling interests, (2) CPLC can effectively advocate its political goals under the rules, and (3) the rules are the least restrictive means available to accomplish the stated compelling interests. As part of this last inquiry, the court will take into count the Ninth Circuit's admonition that disclosure laws may not impose unnecessary and overly burdensome administrative costs and organizational requirements. Getman, 328 F.3d at 1107.

Initially, however, the court should describe the reporting and disclosure regime challenged by CPLC. If a multi-purpose organization expends greater than $1,000.00 on express ballot

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[14](...continued)
activity. Under CPLC's 50%-plus-one definition, an organization could spend $25 million on express ballot measure advocacy but not have a major purpose of campaign activity because its total funds were $51 million. Alternatively, an organization expending just $1,000.00 but with total funds of $1,500.00 would be a major purpose organization. For purposes of this order, the court need not determine the appropriate method for determining a group's major purpose.

measure advocacy, *but has not made expenditures for advocacy exceeding the $1,000.00 threshold within the past four years*, the organization qualifies as an independent expenditure committee, but not as a recipient committee. To become a recipient committee, the organization must receive contributions of $1,000.00 or more. Under the "one bite at the apple" rule, the organization's donors would not be "contributors" because the organization had no history of political activity to put the donors on notice that their donations would be used for political purposes. Cal. Code. Regs. tit. 2 § 18215(b). However, the organization would qualify as an independent expenditure committee, and would be required to appoint a treasurer, comply with record keeping requirements, and file campaign reporting statements disclosing its expenditures. See Cal. Gov't Code §§ 82013(b), 84100, 84104, 84200(b), 82036.5. Notably, however, since independent expenditure committees do not receive contributions, *there is no provision for disclosure of their source of funds*. (See Wardlow Aff. in Opp'n to Pl.'s Mot. for Summ. J. ("Wardlow Aff. II") ¶ 7.) CPLC does not now challenge the reporting and disclosure requirements for independent expenditure committees. (See Pl.'s Mem. in Supp. of Mot. for Summ. J. at 27-28, Pl.'s Opp'n to Defs.' Mot. for Summ. J. at 1.)

If the organization expends $1,000.00 or more on express ballot measure activity *for a second time within a four-year cycle*, its donors become "contributors" by virtue of the organization's past history of political involvement. The group's donors are now on notice that their donations may be used for political purposes. Because the group receives

"contributions" of $1,000.00 or more, it qualifies as a recipient committee.[15] Cal. Gov't Code § 82013(a). As such, it would be subject to the following disclosure and administrative requirements:

1. Registration as a recipient committee, which requires the filing of a Statement of Organization (Form 410), on which the organization must identify its name and the identification number assigned by the state; its address and telephone number; the name of address of a Treasurer and other principal officers, if any, and; if it is a multi-purpose organization such as CPLC, a brief description of its political activities, including whether it supports/opposes candidates or ballot measures and whether activities have common characteristic such as party affiliation. In addition, if the committee, is controlled, it must identify the name of the controlling committee. Cal. Gov't Code §§ 84101, 84102.
2. Appointment of treasurer, who is authorized to make expenditures and accept contributions on behalf of the committee. Cal. Gov't Code § 84101.
3. Maintenance of records "necessary to prepare campaign statements" and otherwise comply with the PRA, which must be kept for four years. Cal. Gov't Code § 84104 and Cal. Code Regs. tit. 2 § 18401.
4. Disclosure of expenditures and contributions over $100.00 for express ballot measure advocacy. (Wardlow Aff. ¶¶ 10-12.)
5. Reporting Requirements: Recipient committees must file Semi-Annual Statements. Cal. Gov't Code § 84200. If the organization does not make reportable contributions or independent expenditures during the period, it only need file a one-page statement of non-activity (Form 425). (Wardlow Aff. ¶ 15.) If, on the other hand, the organization does make contributions or expenditures above threshold levels, it will be required to file as many as four pre-election reports for contributions or independent expenditures of greater than $500.00 during the

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[15] Alternatively, the organization can create a separate recipient committee, commonly referred to as a PAC, through which to engage in express ballot measure advocacy. This alternative simplifies record keeping and accounting. (See Wardlow Affid. ¶ 13.) Under either alternative however, the organization now is a recipient committee or controls a recipient committee and must satisfy applicable PRA reporting requirements.

reporting period and, for the 16-day period before the election, CPLC must file late independent expenditure reports within 24 hours if it contributes $1,000.00 or more to support or oppose a measure appearing on the ballot.[16] In addition, if the group makes contributions or independent expenditures of totaling $1,000.00 or more to a single ballot measure, it must file a separate independent expenditure report, which is linked directly to the ballot measure supported or opposed. Cal. Gov't Code § 84203.5; Wardlow Aff. ¶ 18.

6. Notification to contributors of $5,000.00 or more that they may qualify as major donors. Cal. Gov't Code § 84105 and Cal. Code Regs. tit. 2 § 18427.1.

7. Committee Termination Filing Requirements. Once a recipient committee is organized, it cannot terminate and end reporting requirements until it has (1) ceased to receive contributions and make expenditures and does not anticipate making expenditures in the future, (2) eliminated or declared it has no ability to discharge all of its debts, (3) has no surplus funds, and (4) filed all required campaign statements disclosing all reportable transactions. Cal. Code Regs. tit. 2 § 18404.

The questions before the court then, are whether the above-referenced requirements advance the compelling interests described by the state, whether CPLC can continue to effectively advocate under such rules, and whether the rules constitute the least restrictive means by which the state could achieve its objectives.[17]

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[16] Reporting obligations are modified in odd years, when no general election occurs. For sake of brevity, the court focuses on the higher reporting obligations in even years. See Wardlow Aff. ¶¶ 13-19 for a full explanation of the requirements.

[17] Many of the disclosure and organizational requirements for recipient committees are equivalent to those for independent expenditure committees under the PRA, to which CPLC does not object. See Pl.'s Mem. in Supp. of Mot. for Summ. J. at 27-28. It appears that CPLC's principal objection is to the requirement that recipient committees disclose the source of funds used for political expenditures.

A. Advancement of California's Compelling Interests

As a general matter, the PRA's disclosure requirements directly advance the state's informational interests. Requiring limited disclosure of expenditures made by CPLC for express ballot measure advocacy directly advances the state's interest in informing voters regarding who is paying for the political messages they receive. Similarly, disclosure of the *source of CPLC's funds* used for political advocacy advances the state's interest in revealing the identity of groups that attempt to conceal their political involvement by routing money through groups like CPLC. See Bellotti, 435 U.S. at 792 n.32 (striking down prohibition on corporate advocacy in support of/opposition to ballot measures but noting that disclosure of source of funds may be required "so that the people will be able to evaluate the arguments to which they are being subjected.")(citing Buckley, 424 U.S. at 67); Citizens Against Rent Control, 454 U.S. at 290 (concluding that the integrity of the political system is adequately protected if contributions are identified in public filings revealing the amounts contributed); American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004)(holding that on-publication disclosure of publication's financial sponsors and noting that off-publication disclosure rules are less intrusive and more effective in informing voters regarding the identity of persons supporting a candidate or ballot proposition.)

In addition, the PRA's specific record-keeping and

reporting obligations advance the state's interest in providing usefully-organized information to voters in a timely fashion. Pre-election reports and late contribution reports ensure that voters have the benefit of information regarding contributions made close to election day while that information is still relevant to making informed voting decisions. It almost goes without saying that to prepare such reports, CPLC must maintain the necessary records.

Moreover, the PRA's organizational requirements for groups engaging in express ballot measure advocacy in excess of the $1,000.00 threshold advance the purpose of informing voters by providing voters with basic information regarding the group's identity, how it may be contacted, and its general objectives. Further, by requiring a group to submit simple non-activity reports when not engaged in ballot measure advocacy, and to file a one-page form when the committee terminates, greatly assists the FPPC in its efforts to ensure it has received, and can make available to voters, information regarding all political expenditures made in connection with California elections. Without these requirements, the FPPC and voters would be unable to ascertain if a group who stopped reporting had simply gone out of existence or was flouting its disclosure obligations. (See Wardlow Aff. II ¶ 5.)

The clear correlation between the state's interest and the requirements imposed by the PRA stands in direct contrast to the FECA provisions at issue in MCFL. In MCFL, the state's asserted interest in avoiding the corrosive

influence of corporate money on the political process was not advanced by imposing the burdensome PAC reporting regime on MCFL, a non-profit organization. MCFL, 479 U.S. at 263 ("the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL.") This is not the case here, where the challenged regulations directly advance the state's purposes.

Accordingly, the court finds that the disclosure rules and corresponding reporting, administrative and organizational requirements advance the state's interest in fully informing the electorate regarding the source of contributions and expenditures made for express ballot measure advocacy and in preventing veiled political actors from concealing their identities by channeling funds through groups like CPLC.

B. Ability to Effectively Advocate

Initially, the court notes that the challenged provisions of the PRA do not directly limit CPLC's ability to make expenditures and receive contributions. CPLC can for example, accept contributions from corporations and labor unions, and there is no limit on the amount of contributions it may accept. Likewise, CPLC may make independent expenditures to support or oppose candidates and/or ballot measures without limitation.

However, even absent direct expenditure and contribution limitations, a regulatory regime may be so oppressive as to effectively chill speech. See MCFL, 479 U.S. at 255 n.7 (noting that reporting and disclosure

responsibilities may create a disincentive for an organization to speak); Getman, 318 F.3d at 1104 n.21 (noting need to apply strict scrutiny because disclosure and reporting requirements are "more burdensome for multi-purpose organizations (such as CPLC) than for political action committees whose sole purpose is political advocacy.") In this case however, the court finds that the PRA's disclosure, reporting and organizational requirements, while not trivial, do not prevent CPLC from effectively advocating.

Initially, the court reiterates that, unlike the disclosure provisions struck down by the Supreme Court in Buckley and MCFL, which required disclosure of *all* receipts and expenditures, the PRA requires disclosure only of contributions and expenditures for express political advocacy. The PRA does not compel disclosure of CPLC's non-political expenditures or its full membership lists. CPLC has submitted no evidence that this limited disclosure requirement would somehow impede its ability to raise and expend funds for express ballot measure advocacy.[18]

Nor does the court find that the PRA's organizational and administrative requirements are so burdensome as to be a disincentive for CPLC's to engage in political advocacy. MCFL, 479 U.S. at 255 n.7. Creation of a committee requires

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[18] The court recognizes that the government, not CPLC, bears the burden to demonstrate that the challenged PRA provisions are narrowly tailored. The court references the lack of evidence submitted by CPLC only to support its conclusion that the government has satisfied its burden to demonstrate that CPLC can effectively advocate under the PRA provisions.

only the identification of a treasurer and the submission of a straightforward form with basic information regarding the organization. In addition, the reporting forms are uncomplicated, with one form used for most types of committees, with attached schedules to assist the preparer in determining what information is required. (Wardlow Aff. ¶ 12.) In election cycles when CPLC does not engage in political advocacy, it may satisfy its reporting obligations by twice filling out a single-page form. (Id.) The court notes that CPLC currently satisfies these requirements for its existing PACs without apparent difficulty.

By contrast, in MCFL the challenged FECA provisions prevented MCFL from using money it collected from its members for political advocacy. As member donations were MCFL's primary source of revenue, the court found that the rules essentially prevented MCFL from engaging in political speech. No analogous restriction is placed in CPLC by the PRA.

Accordingly, the court finds that CPLC can advocate effectively under the PRA's disclosure rules and associated organizational and administrative requirements.

B. Least Restrictive Means

Finally, for the challenged regulations to survive strict scrutiny, the government must demonstrate that they are the least restrictive means to achieve the state's objective. Landell, 382 F.3d at 95.

As a general matter, courts repeatedly have recognized that post hoc disclosure requirements are a far less

restrictive means to regulate political speech than contribution and expenditure limitations and on-publication disclosure requirements. See e.g., Citizens Against Rent Control, 454 U.S. at 299-300 (striking down contribution limitations for local ballot measures but noting that the integrity of the system will be adequately protected by public disclosure); Heller, 378 F.3d at 992 (requiring a publisher to report her identity on her communication is considerably more intrusive than simply requiring her to report to a government agency for later publication how she spent her money).

The government has amply demonstrated in this case that there is no available means to achieve the state's informational interest other than requiring organizations making expenditures to disclose that information in a useful and timely fashion. Information contained in publicly filed campaign finance reports is the only reliable source of information available to the public and the press regarding the identity of those actually supporting or opposing a ballot measure as well as those who actually benefit by its passage or defeat. (UF ¶ 83.) If the disclosures were not required from all persons now subject to the PRA's reporting provisions, organizations like CPLC could be used to conceal the identity of major funding sources in election campaigns. (Wardlow Aff. ¶7.) Dismantling the disclosure provisions of the PRA would create loopholes for veiled political actors to exploit and avoid detection of their involvement in

express ballot measure advocacy.[19] (UF ¶ 81.) The court finds that defendants' have demonstrated the necessity of the PRA's disclosure provisions.

CPLC argues however, that the FECA offers a far less restrictive means of defining "contributor" under which CPLC's members likely would not constitute "contributors" triggering CPLC's need to organize as a recipient committee. Under the FECA, contribution is defined as only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 80. By contrast, under Cal. Code Regs. tit. 2 § 18215(b), once an organization establishes a history of express ballot measure advocacy, a donor "should have known" that a portion of the contribution could be used for express ballot measure advocacy, and that donor's funds are deemed to be a contribution.

CPLC argues that the PRA's definition of "contribution", is unconstitutionally overbroad in that it forces CPLC into recipient committee status under which it must report *all* of its members' contributions.

CPLC misstates the reporting obligation for multi-purpose committees under the PRA. (See Pl.'s Mem. in Supp. of Summ. J. at 31-32.) Contrary to CPLC's contention, the PRA requires disclosure of only expenditures made for political purposes. Similarly, CPLC must disclose only

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[19] CPLC's apparent objection to this evidence is overruled. The stated evidence is relevant and not otherwise excluded by the Federal Rules of Evidence. Fed. R. Evid. 402.

contributions of $100.00 or more, and those are first "prorated" based on the percentage of an organization's receipts expended for political purposes. (Eichman Aff. ¶ 9.) To use an example provided by one of the government's experts, assume CPLC made an expenditure of $25,000.00 to oppose a ballot measure during the 1998 election cycle. Based on its 1998 revenue of $234,264.00, 10.67% of CPLC's donor's pro rata donations would be treated as contributions. However, only those that equal or exceed $100.00 must be reported. During that cycle, only three of CPLC's contributors would be reportable. Consequently, CPLC greatly overstates its reporting obligations under the PRA. (See Eichman Aff. ¶¶ 12, 13.)

When presented accurately, the PRA's disclosure provisions are no more intrusive than the FECA's. Rather, the PRA uses a *different* method of reaching the state's objective. In some circumstances, the PRA may require disclosure of more contributors than the FECA; at other times, it will require disclosure of fewer. Moreover, the PRA's definition appears to be more effective and user friendly than the FECA. Unlike the FECA, the PRA does not require organizations to discern a donor's subjective intent in making a donation in order to accurately report contributions. In addition, the PRA definition appears better suited to achieve the state's interest in preventing organizations from concealing their political involvement. Under the FECA's definition, an organization could make a large payment to CPLC without indicating an intent to

influence an election which may go unreported. In response, CPLC argues that "giving undesignated funds to an organization would be a very inefficient and unpredictable means of influencing any election." (Pl.'s Reply in Supp. of Summ. J. at 13.) However, where organizations, such as CPLC, have an established history of advocacy for specific causes, a donor seeking to conceal its identity could make a relatively safe assumption that its funds would be used for that purpose in the future. Accordingly, the court finds that the FECA definition of "contribution" would not be a less restrictive alternative to the PRA definition in Cal. Code Regs. tit. 2 § 18215.

CPLC next argues that the PRA contribution definition creates an unconstitutional presumption that its members' donations are contributions if CPLC has a prior history of express ballot measure advocacy over the $1,000.00 threshold.[20] As CPLC describes it:

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[20] The government disputes this, arguing that Cal. Code Regs. tit. 2 § 18215(b), the so-called "one bite of the apple" rule, creates a presumption that donors or members of an organization like CPLC *do not* have reason to know that their funds will be used for the purpose of making contributions or expenditures in California unless certain factors are present. (Wardlow Aff. ¶ 10.) However, in opinion letters, the FPPC appears to apply Cal. Code Regs. tit. 2 § 18215(b) as though it created a presumption under which organizations that take a second bite at the apple are presumed to be recipient committees. For example, in the September 12, 1990 Olson Opinion Letter, the FPPC indicated that:

> "Once the [organization] has established a history of making contributions from its general fund, its members are deemed to be on notice in subsequent years that a portion of their payments may be used for political purposes. Thus, in any subsequent calendar year in which the [organization] makes contributions out of its general fund totaling $1,000 or more, it will qualify

(continued...)

> Under the regulatory presumption, when an organization make an "independent expenditure" of at least $1,000.00 in a single calendar year, it establishes a 'history' of making 'independent expenditures' and therefore in that same year or within four calendar years, its donors or members are presumed to have 'reason to know' that future donations or dues may be used for such purposes.

(Pl.'s Mem. in Supp. of Pl.'s Mot. for Summ. J. at 26.)

However, assuming arguendo that the PRA definition of "contribution" contains a presumption, it is not thereby rendered unconstitutional. Contrary to CPLC's suggestion, "presumptions" are not per se constitutionally defective, and the cases CPLC cites do not hold otherwise.

CPLC primarily relies on North Carolina Right to Life, Inc. v. Leake, 344 F.3d 418 (4th Cir. 2003), a decision which was vacated and remanded by the United States Supreme Court and has no persuasive value. 124 S. Ct. 2065 (2004). However, it is also distinguishable on its facts. In Leake, the court confronted a North Carolina statute under which a group was presumed to have the "major purpose" of supporting or opposing candidates if it contributed or expended greater than $3,000.00 during an election cycle. Id. at 428. Once defined as a "major purpose" committee, the group was subject to organizational and administrative requirements, most notably the requirement to disclose *all* contributions received and expenditures made. Id. at 423-24. The court drew analogy to Buckley, which narrowed the FECA's

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[20](...continued)

> as a recipient committee."

(Olson Opinion Letter at 3, Ex. B-1 to Eichman Aff.) At a minimum, the passage suggests that contributors are charged with constructive notice of an organization's past political expenditures.

definition of "political committee" to include only those organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Buckley concluded that requiring detailed contribution and expenditures disclosures by such groups was within the "core area" Congress sought to regulate. Id. at 429. However, distinguishing Buckley, the Leake court found that the "major purpose" presumption in that case was based not on the group's major purpose, but on an arbitrary level of political activity. Id. at 430. Thus, the "presumption" treated groups whose actual "major purpose" was not political advocacy as political committees, in violation of the so-called major purpose test.

This court has previously found that the major purpose test is not applicable to this case, and Leake highlights the reason for that conclusion. Unlike Buckley, Leake and, MCFL, where the regulatory schemes subjected groups whose major purpose was not political advocacy to the same disclosure requirements as those with such major purpose, the PRA contains a sliding scale under which groups only must disclose those receipts and expenditures actually related to political advocacy. Even if a group takes a "second bite at the apple" under the PRA and thereby becomes a recipient committee, the group still is not treated the same as a primary purpose committee. The latter types of groups are required to disclose *all* receipts and expenditures on the theory that all activity in which they engage is political in light of their purpose. CPLC, as a

multi-purpose committee, need only disclose those contributions and expenditures made for political purposes.[21] As a result, the PRA is distinguishable from the regulatory schemes in Leake, Buckley, and MCFL.

CPLC also cites Riley v. National Federation of the Blind, 487 U.S. 781 (1988), and Virginia v. Black, 538 U.S. 343 (2003), two cases heavily relied on by the Fourth Circuit in the now-vacated Leake decision. In Riley, the Court considered the constitutionality of a statute prohibiting fundraisers from charging unreasonable or excessive fees. Under the statute, a fee was presumed "unreasonable or excessive" if it exceeded 35%. Noting that the solicitation of charitable contributions was First Amendment protected speech, the Court struck down the 35% presumption as not narrowly drawn to advance the state's purpose of preventing fraud. The Court noted that fundraisers would be subject to the risk of costly litigation regarding the reasonableness of their fees and held that this "must necessarily chill speech." Id.

In Black, a plurality of the Court struck down a Virginia cross burning statute which provided that "any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Black,

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[21] Buckley endorsed this level of disclosure by multi-purpose organizations, explaining that such groups could be required to report "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate: "This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." Buckley, 424 U.S. at 80-81.

538 U.S. at 1538. After describing the risk that juries will be more likely to convict those who engage in cross burning, regardless of the specific facts of the case, the plurality concluded that the provision "creates an unacceptable risk of the suppression of ideas." Id. at 1551.

Both Riley and Black are distinguishable. In both, the Court concluded that the presumptions created an unacceptable risk of chilling protected speech because the presumptions were overinclusive and could sweep up conduct not actually regulated by the statutes (i.e., those whose cross burning was not meant to intimidate). Here by contrast, the second bite at the apple rule does not pose a risk that groups who are not engaged in political advocacy will be regulated under the statute. To the contrary, the second bite at the apple rule is triggered only if an organization has made expenditures for express ballot measure advocacy of $1,000.00 or more during two election cycles within a four year period. Nor does the second bite at the apple rule trigger unnecessary disclosure and reporting obligations. To the contrary, if an organization takes a "second bite at the apple" by making expenditures of $1,000.00 or more in two election cycles during a four-year period, it is required to disclose only its political expenditures the source of funds used to make the expenditures. Certainly, this imposes greater obligations than apply to independent expenditure committees, which are not required to disclose the source of their funds.

However, the requirement that committees like CPLC, which finance their political expenditures with funds received from others, disclose the source of such funds is necessary for California to fully inform its voters regarding the identity of the speaker and to prevent veiled political actors from disguising their participating in the political process by funneling money through multi-purpose organizations such as CPLC.

Accordingly, the court finds that the constructive knowledge language in Cal. Code Reg. § 18215(b) does not create an unconstitutional presumption. The court further finds that the regulatory scheme imposed on CPLC and groups like CPLC who engage in express ballot measure advocacy is the least restrictive means available for California to achieve its compelling interest in fully informing voters and preventing organizations from disguising their involvement in express ballot measure advocacy.

CONCLUSION

For the foregoing reasons, CPLC's motion for summary judgment is DENIED and Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

DATED: February 22, 2005.

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE